BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In the Matter of	)	
Review of the Commission's Regulations Governing Attribution of Broadcast Interests	)	MM Docket No. 94-150
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

To: The Commission

COMMENTS OF WESTINGHOUSE BROADCASTING COMPANY (GROUP W)

WESTINGHOUSE BROADCASTING COMPANY (GROUP W)

Martin P. Messinger
Vice President & General Counsel
Westinghouse Broadcasting Company
200 Park Avenue, 37th Floor
New York, New York 10166
(212) 885-2680

Stephen A. Hildebrandt
Chief Counsel
Westinghouse Broadcasting Company
1025 Connecticut Avenue, N.W., #506
Washington, D.C. 20036
(202) 857-5155

Ramsey L. Woodworth
Robert M. Gurss
Wilkes, Artis, Hedrick & Lane, Chartered
1666 K Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 457-7874

Its Counsel

May 17, 1995

TABLE OF CONTENTS

SUMMARY

No need whatsoever has been shown for the proposed restriction of attribution rules governing non-voting stock and single majority shareholders. There is no evidence that these rules have been used to "evade" the purposes of the basic ownership rules. Rather, the rules provide a clear baseline, based on established principles of control, to differentiate attributable ownership and investment. The result is increased investment in the broadcasting industry at a time when its ability to grow is essential to its competitive success.

Should the Commission, nonetheless, decide to restrict its attribution rules in some way, existing ownership interests in media properties must be grandfathered. Many broadcast stations are now part of complex ownership structures created in reliance on the current attribution rules. Changes in those rules, absent reasonable grandfathering provisions, would lead to sudden and disruptive divestitures that would be highly unfair to parties who acted in honest reliance on rules previously adopted by the Commission.

There is also no reason for the Commission to resurrect the remaining remnants of the cross-interest policy at this time. A broad diversity of broadcast and

non-broadcast video and audio services are available nationwide and locally, including smaller markets. Strategic alliances and investment within local markets is healthy and helps broadcasters compete. The public interest is sufficiently protected by public and private antitrust enforcement.

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

To: The Commission

COMMENTS OF WESTINGHOUSE BROADCASTING COMPANY (GROUP W)

Westinghouse Broadcasting Company ("Group W"), hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding, FCC 94-324, released January 12, 1995.

I. INTRODUCTION AND OVERVIEW

As a broadcast licensee for more than 70 years, Group W has closely followed the development of the Commission's attribution rules and policies. Since adoption of the Commission's first broadcast ownership rules in the 1940's, the attribution rules and policies have grown from relatively simple ad hoc principles of case law into a

complex and interrelated body of rules governing investments in broadcast licensees and the flow of capital into the broadcasting industry. To a significant extent, current industry capital structure and investment patterns have been shaped by the attribution rules and, in particular, the Commission's comprehensive rewrite of these rules in 1984.[1/]

It is for this reason that the Notice wisely recognizes that the Commission must proceed cautiously in this review of the attribution rules. Any change, even seemingly minor on its face, has the potential to have a significant impact, both on existing ownership structures developed in reliance on the rules and on the future capital needs of the broadcasting industry. For this reason, the clear burden is on the proponent of any change to justify both the need for such change and accompanying impact. As the Commission has already said, "[i]n every case, if the new rule or exemption proposed represents a departure from our current rules and standards, commenters should demonstrate the justifications for such a departure." Notice, ¶13.

There have been significant changes in the media marketplace in recent years, meaning that resolution of the

---

[1/] The current attribution rules were adopted in Report and Order, MM Docket No. 83-46, 97 FCC 2d 997 (1984), recon. granted in part, Memorandum Opinion and Order, MM Docket No. 83-46, 58 RR 2d 604 (1985), further recon. granted in part, Memorandum Opinion and Order, MM Docket No. 83-46, 1 FCC Rcd. 802 (1986).

Commission's companion proceeding reviewing the basic television ownership rules is overdue.[2/] This does not mean, however, that there is a corresponding need to review the attribution rules on the same fast track. The two sets of rules are not inversely proportional to each other. Certainly, no basis exists for expanding the types of interests that are considered attributable merely because some of the ownership rules are relaxed. The attribution rules should stand on their own, independent of whatever specific limits are set forth in the ownership rules.

Nor is it correct to suggest that certain of the attribution rules have been used to "evade" the purposes of the basic ownership rules. See, e.g., Notice, ¶¶ 3, 51. The use of new business structures which reflect attribution rule principles do not mean that ownership rule limits are being evaded. Ownership interests which are clearly permissible under the attribution rules do not become suspect merely because the interest would violate an ownership limit, if deemed to be attributable. Rather, one must look to the underlying purposes of the ownership and attribution rules.

From this standpoint, Group W is unaware of any empirical evidence that the current attribution rules have generally allowed holders of nonattributable interests to

---

[2/] Group W is also filing comments in MM Docket No. 91-221, addressing the television ownership rules.

exert unreasonable influence over the operations of broadcast stations in which they hold such interests. Even if there had been isolated instances of such influence, the Commission would need to balance that against the impact of an overly broad rule that could disrupt existing ownership structures and restrict the flow of capital to the broadcasting industry.

II. THE EXISTING ATTRIBUTION RULES GOVERNING NON-VOTING STOCK AND SINGLE MAJORITY SHAREHOLDERS SHOULD NOT BE RESTRICTED

As a general principle, the Commission has deemed an interest to be attributable when it conveys sufficient legal rights and is of sufficient magnitude to be likely to lead to influence over the programming, finances and personnel policies of broadcast facilities. For this reason, the Commission currently does not attribute ownership of non-voting stock or minority voting stock interests where there is a single majority shareholder. Such interests have no ability to exert influence, since one is by its definition a non-voting interest and the other reflects a situation where a single majority shareholder has authority to control the entity. The minority shareholder can attempt to influence, but, as a matter of basic corporate governance, can be rebuffed without consequence.

These principles have been widely accepted for some time and, until recently, were noncontroversial. Since the

advent of the first codified attribution rule in 1953, non-voting stock has been treated as a nonattributable interest. While newer, the single majority shareholder exception has been in force since 1984, with not one instance of an established case of abuse.

The Notice, however, proposes to restrict the use (i.e., expand the attributability) of both types of equity holdings. Rather than hard evidence or empirical study, this proposal appears to be based upon no more than pure speculation. When the record is fairly considered, there is no basis in fact for restricting either rule.

As set forth in the Notice, two specific concerns appear to underline the proposal. First, the Commission appears to be concerned that nonattributable interests may be being used in combination to secure interests that would otherwise be impermissible under the various ownership limits. To quote the Notice,

> ". . . we are concerned that otherwise permissible cooperative arrangements between broadcasters, which seem to be occurring more frequently in recent years, are being used in combination by those broadcasters to obtain, indirectly, controlling interests in multiple stations that they would be prohibited from holding directly under the multiple ownership rules."[3/]

Second, concern is expressed that the current attribution limits may be being used to acquire non-

---

[3/] Notice, ¶3.

attributable interests in network affiliated stations in order to influence station affiliation. Again, to quote the Notice,

> "For example, concerns have been raised recently that networks, while securing interests in stations that do not trigger attribution of an ownership interest, may nevertheless have used (nonvoting or otherwise nonattributable) equity investments to influence station affiliation decisions. See Christopher Stern, 'Small Investments Yield Big Benefits,' Broadcasting & Cable, October 17, 1994, at 26."[4/]

Neither concern is well-placed. As to the first, as previously indicated, there is no significant evidence of abuse. Moreover, even if there were, it is impossible to identify as a general rule what combination of factors is likely to lead to an actual ability to exert influence. Where issues of possible de facto influence or control are involved, the evaluation ". . . is not formulaic, but is fact-intensive, dependent upon the 'special circumstances presented.'"[5/] To attempt to codify in advance those combinations of factors which would automatically make non-attributable interests attributable invites overly restrictive standards which would unwisely preclude legitimate business arrangements.

[4/] Notice, ¶3, fn. 8. As one of the business partnerships mentioned in this article involves Group W, we have a direct interest in this matter.

[5/] BBC License Subsidiary L.P., FCC 95-179, released April 27, 1995, ¶35, citing Stereo Broadcasters, Inc., 55 FCC 2d 819, 821 (1975).

More importantly, under the present attribution rules, the Commission has ample powers to deal with unusual circumstances. The Commission customarily reviews transactions involving substantial nonattributable interests on a case-by-case basis to ensure that the purposes of the attribution rules are not circumvented. See, e.g., NBC, Inc. (WKYC-TV), 6 FCC Rcd. 4882 (1991). This process, rather than the general restriction of a well-established attribution principle, is the proper way in which to handle any unusual circumstances that may arise.

As to the second expressed concern, it is not inappropriate for the holder of a nonattributable interest to have a role in such fundamental business questions as network affiliation prior to making an investment. As the Commission held only last month, ". . . merely entering into an affiliation agreement with a network which is also an equity partner does not, without more, establish an attributable interest, let alone control."[6/]

The Commission has long recognized that passive investors may take part in core decisions regarding matters such the sale of substantial assets, major acquisitions and the assumption of debt. In the television broadcasting business, few factors are more basic to a business enterprise than network affiliation. Where such an

---

[6/] BBC License Subsidiary L.P., supra, at ¶39, citing NBC, Inc. (WKYC-TV), supra.

arrangement is a basic structural component of an enterprise and is agreed to prior to the investment, there is no reason to equate this to an ongoing power over station programming, financial and personnel policies sufficient to cause an otherwise nonattributable interest to become attributable.

III. ANY RESTRICTIVE CHANGES IN THE ATTRIBUTION RULES SHOULD ONLY BE DONE ON A PROSPECTIVE BASIS

Should the Commission, nonetheless, expand the ownership interests subject to attribution, it must grandfather existing ownership arrangements to prevent serious disruptions in the media marketplace. As recognized in the Notice, requiring divesture could lead to the forced divestiture of substantial ownership interests in many media properties with a serious detrimental impact on the industry and its ability to provide for the needs of viewers and listeners. Notice, ¶15. It could also reduce or eliminate important sources of capital, especially for licensees controlled by small businesses, women and minorities.

In the past, in virtually all cases, new ownership restrictions have included a grandfathering provision to prevent such disruptions. Indeed, the multiple ownership rules now expressly provide that the rules "will not be applied so as to require divestiture, by any licensee, of existing facilities." 47 C.F.R. §73.3555 (Note 4). Recent examples where grandfathering provisions were adopted as

part of new ownership rules include the Commission's cable vertical ownership restrictions, Second Report and Order in MM Docket 92-264, 73 RR 2d 1401, 1418 (1993), and 1992 Cable Act requirements that new cable/MMDS and cable/SMATV cross-ownership rules not apply to existing ownership arrangements. 47 U.S.C. §553(a)(2)(A). In both cases, grandfathering existing interests was deemed essential to prevent disruptions to the relevant media industry.

One of the rare instances in which the Commission chose not to adopt grandfathering provisions was 50 years ago in the original chain broadcasting rules. That unique situation, however, is a far cry from the present issues under consideration. There, after substantial proceedings, the Commission found substantial evidence of harm to competition and diversity if specifically identified ownership arrangements were allowed to persist. In the present situation, the Commission has not even identified the holders of ownership interests to whom a divestiture requirement might apply or made any detailed analysis of the media properties and specific ownership rules which would be implicated. Nor in this age of a broad diversity of broadcast, cable and new technology services could the Commission possibly have a basis to make finding of specific harm to competition or diversity sufficient to require existing ownership arrangements to be dismantled.

The Commission further questions whether it should adopt a transition period as an alternative to grandfathering. However, a transition is no more justifiable than requiring immediate divestiture. In either case, there is no substantial evidence of harm cause by existing ownership arrangements. Furthermore, while a transition period might be somewhat less disruptive, any forced divestiture covering an entire industry will still have a negative impact on the marketplace. There would still be a "buyers market" that will disrupt operations throughout the industry for many years.

IV. THE CROSS-INTEREST POLICY SHOULD BE PROMPTLY REPEALED

The Notice (Section VIII) raises the issue of whether the remaining vestiges of the cross-interest policy should be retained. This is an issue which has now been before the Commission for over eight years. In response to the Commission's Initial Notice of Inquiry, adopted May 14, 1987, Group W supported the Commission's proposal to repeal all aspects of the policy. Our position has not changed since that time.[7/] With extensive ownership restrictions now codified into specific rules, the utilization of a separate cross-interest policy is an historical anachronism

---

[7/] See Comments of Group W, filed July 31, 1987, in MM Docket No. 87-154.

that only serves to complicate and confuse the Commission's ownership policies. If a particular policy is still important, it should be expressed in a clear rule. If it is no longer important, it should not be allowed to continue to exist as an optional policy to be applied at the whim of the Commission. With respect to structural ownership limitations, the basic ground rules should be known in advance by all parties and not subject to ad hoc determination.

As presently constituted, the cross-interest policy remains potentially applicable to key employees, non-attributable equity interests, and joint venture arrangements. Notice, ¶81. Given the present diversity of video and audio services that are now available nationwide and locally, including smaller markets, there is no need to restrict these aspects of broadcast operation in some general fashion. This is perhaps best illustrated by the extent to which the cross-interest policy has fallen into disuse in recent years. To the extent a particular market problem might develop in the future, the remedies available under the antitrust laws to both public and private parties should be more than sufficient to take care of the problem and preserve a diverse and competitive marketplace.

CONCLUSION

For these reasons, Group W urges the Commission to make no changes in existing attribution rule principles governing non-voting stock and the holding of interests by a single majority shareholder. Furthermore, the remaining vestiges of the cross-ownership policy should be promptly repealed.

Respectfully submitted,

WESTINGHOUSE BROADCASTING COMPANY (GROUP W)

Martin P. Messinger
Vice President & General Counsel
Westinghouse Broadcasting Company
200 Park Avenue, 37th Floor
New York, New York 10166
(212) 885-2680

Stephen A. Hildebrandt
Chief Counsel
Westinghouse Broadcasting Company
1025 Connecticut Avenue, N.W., #506
Washington, D.C. 20036
(202) 857-5155

Ramsey L. Woodworth
Robert M. Gurss
Wilkes, Artis, Hedrick & Lane, Chartered
1666 K Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 457-7874

Its Counsel

May 17, 1995